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10/788,587	02/27/2004	Timothy A. Otterlee	R122 1020.3	6842

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EXAMINER

VANAMAN, FRANK BENNETT

ART UNIT	PAPER NUMBER
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3618

SHORTENED STATUTORY PERIOD OF RESPONSE	MAIL DATE	DELIVERY MODE
3 MONTHS	01/18/2007	PAPER

Please find below and/or attached an Office communication concerning this application or proceeding.

If NO period for reply is specified above, the maximum statutory period will apply and will expire 6 MONTHS from the mailing date of this communication.

Office Action Summary

Application No.

10/788,587

Applicant(s)

OTTERLEE ET AL.

Examiner

Frank Vanaman

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-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE 3 MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

- 1) ☒ Responsive to communication(s) filed on 03 November 2006.
- 2a) ☒ This action is **FINAL**. 2b) ☐ This action is non-final.
- 3) ☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

- 4) ☒ Claim(s) 1-3,5-12 and 14-34 is/are pending in the application.
- 4a) Of the above claim(s) _____ is/are withdrawn from consideration.
- 5) ☐ Claim(s) _____ is/are allowed.
- 6) ☒ Claim(s) 1-3,5-12 and 14-30 is/are rejected.
- 7) ☒ Claim(s) 31-34 is/are objected to.
- 8) ☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

- 9) ☐ The specification is objected to by the Examiner.
- 10) ☐ The drawing(s) filed on _____ is/are: a) ☐ accepted or b) ☐ objected to by the Examiner.
Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).
Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).
- 11) ☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

- 12) ☐ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).
- a) ☐ All b) ☐ Some * c) ☐ None of:
1. ☐ Certified copies of the priority documents have been received.
2. ☐ Certified copies of the priority documents have been received in Application No. _____.
3. ☐ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).
- * See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

- 1) ☒ Notice of References Cited (PTO-892)
- 2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
- 3) ☐ Information Disclosure Statement(s) (PTO/SB/08)
Paper No(s)/Mail Date _____
- 4) ☐ Interview Summary (PTO-413)
Paper No(s)/Mail Date: _____
- 5) ☐ Notice of Informal Patent Application
- 6) ☐ Other: _____

Status of Application

1. Applicant's amendments, filed June 26, 2006, September 19, 2006, and November 3, 2006, have been entered in the application. Claims 1-3, 5-12, 14-34 are pending, claims 4 and 13 having been canceled.

Claim Objections

2. Claims 5 and 14 are objected to because they have been written to depend from canceled claims. For the purpose of this office action, claim 5 is assumed to depend from claim 1; claim 14 is assumed to depend from claim 10.

Appropriate correction is required.

Claim Rejections - 35 USC § 102

3. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

4. Claims 1-3, 6, and 7 are rejected under 35 U.S.C. 102(b) or (e) as being anticipated by Johnson et al. (US 6,270,093, published 8/2001). Johnson et al. teach a shopping cart which may receive at least a portion of another cart, having a metallic tube frame (18, 22), a plurality of wheels (12, 14, 34) coupled to the frame, a basket ("B", 4) coupled to the frame, a molded plastic body (30, 46, 44) having substantially solid surfaces and coupled to the frame, covering at least a rear portion of the basket; a molded plastic seat (40, 42) coupled to the body and integrally formed with the body, defining a seat portion (e.g., 40, 42) having forward facing elements (i.e., forward facing portions of 42, 46, 48) which face the rear face of the basket portion, a back portion (proximate rear of 42, 46, 48) which assist in defining there-above a first nesting space, further providing there-below a further nesting space (note particularly, figure 8); the first nesting space receiving a basket of a second cart (e.g., figure 16).

Claim Rejections - 35 USC § 103

5. The text of those sections of Title 35, U.S. Code not included in this action can be found in a prior Office action.

6. Claim 5 is rejected under 35 U.S.C. 102(b) or (e) as anticipated by or, in the alternative, under 35 U.S.C. 103(a) as obvious over Johnson et al. As regards interpretation under 35 USC 102(b) or (e), while Johnson et al. does not refer to the

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body and seat portion as having explicitly been integrally formed using a rotomolding process, the product disclosed in the prior art is not distinguished in structure from the product resulting from the process steps. Alternatively, as regards interpretation under 35 USC 103(a), the use of a rotomolding process is very well known for the production of plastic parts having consistent physical characteristics for comparatively low cost, and as such, it would have been obvious to one of ordinary skill in the art at the time of the invention to have made the body and seat portion by a rotomolding process for the purpose of reducing the cost of its construction.

7. Claims 8-12, and 14-22 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson et al. in view of Swanson (US 3,052,319). Johnson et al. teach a shopping cart which may receive at least a portion of another cart, having a metallic tube frame (18, 22), a plurality of wheels (12, 14, 34) coupled to the frame, a basket ("B", 4) coupled to the frame, a molded plastic body (30, 46, 44) having substantially solid surfaces and coupled to the frame, covering at least a rear portion of the basket; a molded plastic seat (40, 42) coupled to the body and integrally formed with the body, defining a seat portion (e.g., 40, 42) having forward facing elements (i.e., forward facing portions of 42, 46, 48) which face the rear face of the basket portion, a back portion (proximate rear of 42, 46, 48) which assist in defining there-above a first nesting space, further providing there-below a further nesting space (note particularly, figure 8); the first nesting space receiving a basket of a second cart (e.g., figure 16). Johnson fails to teach the cart as comprising a second basket, one basket being provided above the other. Swanson teaches an old and well known cart construction wherein a shopping cart is formed with both an upper (48) and lower (46) basket, the lower basket extending forwardly from a frame portion (e.g., 22) a distance greater than that of the upper basket, wherein the cart may be nested with another like cart (col. 2, lines 37-44). It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the cart taught by Johnson et al. (e.g., at figure 8) with a further vertically displaced basket (e.g., 46) as taught by Swanson, for the purpose of allowing a greater number of items to be accommodated on the cart.

As regards claims 14 and 19, while Johnson et al. as modified by Swanson does not refer to the body and seat portion as having explicitly been integrally formed using a rotomolding process, the product disclosed in the prior art is not distinguished in structure from the product resulting from the process steps. Alternatively the use of a rotomolding process is very well known for the production of plastic parts having consistent physical characteristics for comparatively low cost, and as such, it would have been obvious to one of ordinary skill in the art at the time of the invention to have made the body and seat portion by a rotomolding process for the purpose of reducing the cost of its construction.

8. Claims 23 and 25-27 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson et al. in view of Struzer (US 5,704,527). The reference to Johnson et al. fails to teach the provision of one of an entertainment device including a display and interactive device. Struzer teaches that it is old and well known to provide an entertainment device in the form of a radio, television (understood to inherently include a screen), audio cassette player, CD player and/or video cassette player coupled to a wheeled transport vehicle such as a stroller. It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the cart of Johnson et al. with an entertainment device such as a video device, as suggested by Struzer, for the purpose of providing entertainment to the cart's occupants, when in use. Note that any operational controls of such a device are interactive in that a user interacts with them. As regards claim 27, the reference to Struzer fails to explicitly describe the provision of a joystick, however joysticks and multi-position pad elements are well known in the fields of audio and video entertainment devices for uses in at least transport control, audio output control, and function selection, and it would have been obvious to one of ordinary skill in the art at the time of the invention to provide at least one control of the device as a joystick for the purpose of allowing a user to control more than a single parameter with a single control.

9. Claim 24 is rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson et al. in view of McCue et al. (US 6,513,817). The reference to Johnson et al. is discussed above and fails to teach the provision of a computer game or electronic

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game. McCue et al. teach that it is well known to provide an element (e.g., 26) accessible to a rider (fig. 4) in a passenger portion of a shopping cart, with an entertainment device (40) in the form of electronic game device (col. 4, lines 22-28). It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the cart taught by Johnson et al. with an electronic game device as suggested by McCue et al. for the purpose of providing amusement to a passenger of the cart.

10. Claims 28-30 are rejected under 35 U.S.C. 103(a) as being unpatentable over Johnson et al. in view of Swanson and Struzer. The reference to Johnson et al. as modified by Swanson fails to teach the provision of one of an audio device comprising a radio receiver or internal broadcast receiver, a video display coupled to a VCR or disk player, or a video display coupled to an audio/video receiver. Struzer teaches that it is old and well known to provide an entertainment device in the form of a radio, television, audio cassette player, CD player and/or video cassette player coupled to a wheeled transport vehicle such as a stroller, at least radio devices being capable of being tuned to a desired frequency previous to operation. It would have been obvious to one of ordinary skill in the art at the time of the invention to provide the cart of Johnson as modified by Swanson with an entertainment device, as suggested by Struzer, for the purpose of providing entertainment to the cart's occupants, when in use.

Allowable Subject Matter

11. Claims 31-34 are objected to as being dependent upon a rejected base claim, but would be allowable if rewritten in independent form including all of the limitations of the base claim and any intervening claims.

Response to Comments

12. Applicant's comments, filed with the amendment(s) have been carefully considered. As regards the reference to Johnson et al., as discussed with respect to claims 1-3, 6 and 7, please note that the forward facing portions of the seating elements (e.g., the forward facing portions of 42, 46, 48) of Johnson are all arranged in an orientation facing forwardly (or, as regards later-discussed claims 18-22, facing toward the rear portion of the basket located forwardly of the seat), to the breadth this limitation is actually recited.

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As regards the combination of Johnson et al. with Swanson, initially the examiner notes that one cannot show nonobviousness by attacking references individually (i.e., Johnson et al. fail to teach two baskets; Swanson fails to teach a seat portion) where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986).

That Swanson includes elements which "may not be needed" (applicant's reference to the gate portions) is noted, however the presence of these elements does not render the combination inoperative, inasmuch as the combined structure would continue to allow nesting, based on the use of baskets having a greater longitudinal extension. As regards Swanson's first and second baskets, note that the lower of the two baskets extends forwardly a greater distance from the frame portion (e.g., 22) than the upper of the two baskets.

The examiner notes that applicant's assertions that the references appear to teach away from the combination and the lack of an appearance of success of the combination is not supported by a clear showing of facts to adequately support these assertions. The arguments of counsel cannot take the place of evidence in the record. *In re Schulze*, 346 F.2d 600, 602, 145 USPQ 716, 718 (CCPA 1965).

Applicant has asserted that there is no motivation to combine the references, however the examiner disagrees, inasmuch as a motivation is clearly set forth in the statements of rejection. Note that a conclusion of obviousness may be made from common knowledge and common sense of the person of ordinary skill in the art without any specific hint or suggestion in a particular reference (see *In re Bozek*, 416 F.2d 1385, 1390, 163 USPQ 545, 549 (CCPA 1969)), with skill being presumed on the part of the artisan, rather than the lack thereof (see *In re Sovish* 769 F.2d 738, 742, 226 USPQ 771, 774 (Fed. Cir. 1985)); further, references may be combined although none of them explicitly suggests combining one with the other (see *In re Nilssen* 7 USPQ2d 1500 (Fed. Cir. 1989)). It has long been the law that the motivation to combine need not be found in prior art references, but equally can be found "in the knowledge generally

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available to one of ordinary skill in the art." In re Jones, 958 F.2d 347, 351 (Fed. Cir. 1992) (citing In re Fine, 837 F.2d 1071, 1074 (Fed. Cir. 1988)).

The motivation to combine can be found either in a prior art reference, or it can be implicit in the knowledge of one of ordinary skill in the art. See In re Huston, 308 F.3d 1267, 1280 (Fed. Cir. 2002); Motorola, Inc. v. Interdigital Tech. Corp., 121 F.3d 1461, 1472 (Fed. Cir. 1997).

Sources suggesting a combination may be: (1) the combined teachings of the prior art, (2) the knowledge of the ordinary practitioner and (3) the nature of the problem to be solved. "The test for implicit showing is what the combined teachings, knowledge of one of ordinary skill in the art, and the nature of the problem to be solved as a whole would have suggested to those of ordinary skill in the art." In re Kotzab, 217 F.3d 1365, 1370, 55 USPQ2d 1313, 1317 (Fed.Cir. 2000).

In Richard Ruiz and Foundation Anchoring Systems, Inc. v. A.B. Chance Company, No. 03-1333 (Fed. Cir. January 29, 2004), the court emphasized that an "express written teaching in the art" to combine references was not required [emphasis added]. Rather, motivation may come from "the nature of a problem to be solved, leading inventors to look to references relating to possible solutions to that problem."

Please further note the following from Section 2144 of the MPEP: "The rationale to modify or combine the prior art does not have to be expressly stated in the prior art or it may be reasoned from knowledge generally available to one of ordinary skill in the art, established scientific principles, or legal precedent...The reason or motivation to modify the reference may often suggest what the inventor has done, but for a different purpose or to solve a different problem...It is not necessary that the prior art suggest the combination to achieve the same advantage or result discovered by Applicant." Also Chief Judge Nies writes in a concurring opinion, "While there must be some teaching, reason, suggestion, or motivation to combine existing elements to produce the claimed device, it is not necessary that the cited references or the prior art specifically suggest making the combination...In sum, it is off the mark for litigants to argue, as many do, that an invention cannot be held to have been obvious unless a suggestion to combine

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prior art teachings is found in a specific reference". See *In re Oetiker* 977 F.2d 1443, 24 USPQ.2d 1443 (Fed.Cir.1992).

Conclusion

13. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire **THREE MONTHS** from the mailing date of this action. In the event a first reply is filed within **TWO MONTHS** of the mailing date of this final action and the advisory action is not mailed until after the end of the **THREE-MONTH** shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than **SIX MONTHS** from the date of this final action.

14. Any inquiry specifically concerning this communication or earlier communications from the examiner should be directed to F. Vanaman whose telephone number is 571-272-6701.

Any inquiries of a general nature or relating to the status of this application may be made through either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see <http://pair-direct.uspto.gov>. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free).

A response to this action should be mailed to:

Mail Stop _____
Commissioner for Patents
P. O. Box 1450
Alexandria, VA 22313-1450,

Or faxed to:

PTO Central Fax: 571-273-8300

F. VANAMAN
Primary Examiner
Art Unit 3618

Handwritten signature of F. Vanaman, dated 11/9/07.